No. 87-2108

In The
Supreme Court of the United States
October Term, 1988

THE BLACKFEET INDIAN TRIBE,
Petitioner,
vs.
THE MONTANA POWER COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. This Case Raises A Legal, Not A Factual, Question

As indicated in the Question Presented in our Petition for Certiorari, this case presents the issue of the proper term for oil and gas pipeline rights-of-way across Indian lands where there are two statutes on the subject: the Act of March 11, 1904, 33 Stat. 65, 25 U.S.C. 321, (the 1904 Act), which specifies a maximum twenty-year term; and the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. 323-328, (the 1948 Act), which does not specify a term, but which does preserve the 1904 Act. *See* section 4 of the 1948 Act, 25 U.S.C. 326. The Secretary takes the position that he can grant rights-of-way under the 1948 Act for any term, unconstrained by the 1904 Act. The Blackfeet Tribe maintains that the Secretary is constrained by the 1904 maximum term even if the grant is made under the 1948 Act because the 1948 Act specifically preserves the 1904 Act.

The proper relationship of the two Acts is important for every oil and gas pipeline which has been granted across Indian lands, and for every grant which will be made in the future. The issue affects the negotiation, compensation and the proper conditions of a pipeline right-of-way grant. As long as the relationship between the statutes is unclear, there will be continuing uncertainty and confusion in the granting of pipeline rights-of-way and other kinds of rights-of-way. *See* n.1 *infra.*

The Court of Appeals held that the 1904 and 1948 Acts are separate and independent statutes, and that the Tribe could choose either a twenty year term under the

1904 Act or a fifty year term under the 1948 Act. This interpretation flies directly in the face of the purpose of the 1948 Act "to satisfy the need for simplification and uniformity in the administration of Indian law." S.Rep. 823, 80th Cong., 2d. Sess. 3-4 (1948). Rather than simplification and uniformity, the Court of Appeals decision causes confusion and uncertainty about the terms and conditions of all oil and gas pipeline right-of-way grants.[1] It is much more reasonable to construe the statutes as an integrated right-of-way scheme. *See Plains Electric Gen. and Tr. Co-op. v. Pueblo of Laguna*, 542 F.2d 1375, 1380-81 (10th Cir. 1976).

The Secretary's regulations under either statute must be consistent with the law as expressed in both the 1904 and 1948 Acts, *Dixon v. United States*, 381 U.S. 68, 74 (1975); *United States v. Doe*, 701 F.2d 819, 823 (9th Cir. 1983); *Loma Linda University v. Schweiker*, 705 F.2d 1123, 1126 (9th Cir. 1983), especially if the later 1948 Act preserves the earlier 1904 Act. Congress would not preserve the twenty-year maximum term on the one hand and allow the Secretary to violate that term by regulation on the other hand. The 1948 Act authorizes the Secretary to prescribe conditions for rights-of-way, but the author-

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[1] Four other existing right-of-way statutes were also preserved by section 4 of the 1948 Act: Act of Mar. 3, 1901, 31 Stat. 1084, 25 U.S.C. 311 (Opening of highways); Act of Mar. 2, 1899, 30 Stat. 990, 25 U.S.C. 312-318 (Rights-of-way for railway, telegraph & telephone lines); Act of Mar. 3, 1901, 31 Stat. 1083, 25 U.S.C. 319 (Rights-of-way for telephone & telegraph lines [Oklahoma]); Act of Mar. 3, 1909, 35 Stat. 781, 25 U.S.C. 320 (Rights-of-way for reservoirs or materials). Thus the Court of Appeals decision potentially causes confusion and uncertainty as to the terms and conditions of each of these various kinds of rights-of-way.

ity bestowed on the Secretary is not the power to ignore or violate other laws which Congress has preserved in the same statute.[2]

The Court of Appeals chose to focus on the factual issue of the term of years consented to by the Tribe to determine the validity of the fifty-year term.[3] We believe the court's focus was in error, and in any case, the Court relied on a fact not supported by the record, *see* Part II of the Tribe's Petition for Certiorari. Therefore, this is another reason for this Court to review the Court of Appeals' decision.

Montana Power Company argues that the Tribe raises the consent issue for the first time. However, the Tribe argued in both the District Court and the Court of Appeals that the Tribe did not consent to a fifty-year term, and in any case, it could not make an invalid term valid merely by its consent. It is true that the issue was never the focus of any of the parties' arguments nor the decision of the District Court, reprinted at Appendix 12-18. It was the Court of Appeals which relied on the consent

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[2] At a minimum, the 1904 Act exists as a qualification to the 1948 Act as to the term of years for pipeline rights-of-way. *See Sutherland Statutory Construction* 23.15 (4th ed.) ("[w]here the later general statute does not present an irreconcilable conflict, the prior special statute will be construed as remaining in effect as a qualification of or exception to the general law"); *Stewart v. United States,* 106 F.2d 405, 409 (9th Cir. 1939) ("the fact that one is special and the other general creates a presumption that the special is to be considered as remaining an exception to the general.")

[3] In fact, the Court of Appeals seems to have held that the Tribe's consent validated the fifty-year term: "Since the Tribe consented to the 50-year term, the Secretary's regulations with respect to terms of years are valid." Appendix at 10.

issue as the basis for its decision, thereby elevating an irrelevant issue to an unwarranted importance. In fact, the Tribe's consent or non-consent has no bearing on the proper interpretation of the 1904 and 1948 Acts. Because the Court of Appeals relied on an irrelevant fact for the linchpin of its decision, however, this Court ought to review and reverse the decision.[4]

II. The Secretary Has Consistently Required A Twenty-Year Maximum Term Except For The Eight-Year Period When The Rights-Of-Way At Issue Were Granted

The Secretary has required a twenty-year term limitation for oil and gas pipeline rights-of-way since the 1948 Act was enacted, except for the brief period between 1960 and 1968 when the rights-of-way at issue were granted. *See e.g.* 25 C.F.R. 256.19 (1951); 25 C.F.R. 161.25(a) and (b) (1968). Twenty-year maximum terms are required even now. 25 C.F.R. 169.25(a) and (b) (1987). Thus, the

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[4] Because the Tribe did not consent to fifty-year terms, the necessary informed consent required under the 1934 Indian Reorganization Act, 25 U.S.C. 476, is lacking. In addition, if the term is fifty years rather than twenty years, then the adequacy of the compensation is questionable. The Tribe has indicated all along that no monetary compensation was received for any of the rights-of-way at issue. The bonuses and royalties referred to by Montana Power in their Brief in Opposition at 2 are compensation for the oil and gas leases between the Tribe and MPC and are not compensation for the pipeline right-of-way. The Tribe does not ask the Court to review this issue or the consent issue except to suggest that if these questions of fact are relevant at all, they should be remanded for adequate fact-finding. However, we note that Montana Power Company obtained a very significant benefit from the Blackfeet Tribe for virtually no compensation. Montana Power's benefit is substantially enhanced, and the Tribe's detriment greatly increased, if the benefit extends for fifty years rather than twenty years.

Secretary's regulations consistently have been in conformity with the 1904 Act.

The Secretary now says that even though twenty-year maximum terms have been consistently required, the Secretary has always considered that he had authority to provide for longer terms. This is a convenient after-the-fact explanation. The Bureau of Indian Affairs has twice proposed longer terms, *see* 46 Fed. Reg. 22205 (1981); 51 Fed. Reg. 1391 (1986), but these regulations were never adopted as final. What the Secretary has actually adopted is more indicative of his position on the proper term than what has been proposed by the BIA but never adopted.

CONCLUSION

For the above reasons and the reasons set out in the Tribe's Petition for Certiorari, the Petition for Certiorari should be granted.

Respectfully submitted,

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